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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 46

LEE CASSELL, *Petitioner*

v.

STATE OF TEXAS, *Respondent*

On Writ of Certiorari to the Court of Criminal Appeals of the State of Texas.

SUPPLEMENTAL BRIEF FOR THE STATE OF TEXAS, RESPONDENT

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Pursuant to request made in open court during oral argument of the above-styled cause, the State of Texas files this, its supplemental brief.

Petitioner contends that this record shows that no Negroes were summoned for grand jury service and not impanelled on the grand jury or excused by the Court in those instances where no Negro served.[1] It is submitted that there is nothing in the record

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[1]These grand juries are shown to be October, 1943, April, 1946, April and October, 1947. Brief Of The State of Texas, p. 34.

here which would support such a contention, nor is there any "invariable pattern" shown.[2]

This Court may judicially notice *Weems v. State*, 148 Tex. Crim. 154, 185 S. W. 2d 431 (1945). An indictment for murder against a Negro by the October, 1943 grand jury of Dallas County, one of those upon which no Negro served, was involved in that case. The defendant there moved to quash the indictment because "no negro or member of the African race was selected and impanelled in said grand jury." The facts were stipulated as follows:

> "That defendant is a negro, a member of the African race. That he was indicted at the October Term, 1943, of this court, by the grand jury impanelled at that time. That the grand jury panel was drawn for that term consisting of sixteen men, as provided by law, and that the last man on the list, Jackson Taft, was a negro, the first fifteen were white men. That in impanelling the grand jury the ninth man on the grand jury panel, to-wit, J. H. Colwell, was excused for some cause, and that the first thirteen names less the name of Colwell, to and including the name of B. L. Morrison, was impaneled as the grand jury for that term, and that the negro, Jackson Taft, was not impaneled, and he did not offer any excuse of disqualification, but his name was not reached on the grand jury panel in impaneling the twelve men of the grand jury for that term."

It is thus shown that on at least one of those grand juries upon which no Negro served (October, 1943)

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[2]Brief For Petitioner, Lee Cassell, p. 12.

there was a Negro summoned for service and not impanelled. It follows that Petitioner's contention of "an invariable pattern" is not tenable since from judicial notice alone it can be shown that Negroes were called for at least one grand jury upon which none were impanelled. The record shows only those Negroes who actually served on the grand jury. It does not show the names of all sixteen men on the panel from which the grand jury was selected.

Petitioner and Respondent take different views of the effect of the testimony of A. C. Partee, Executive Secretary of the Progressive Voters' League. (R. 12-14.) The witness testified at one time that "I would roughly estimate that the male adult voting strength of the negro race in Dallas County is about 5,500." (R. 13.) At another time he testified that "there are some 5,500 colored Poll Tax payers in Dallas County." (R. 13.) This latter statement was used by Respondent as a basis for the statistics it submitted to this Court to show the approximate number of Negroes eligible for service upon grand juries in Dallas County.[3]

In the Brief For The State of Texas at page 37, after computations based upon the 1940 census, the total number of poll tax receipts in Dallas County for 1947, as shown by the Texas Almanac, and the estimated male portion of the total Negro poll tax payers as testified by the witness Partee, it is shown that 6.57 per cent of the persons eligible for service on the grand juries in Dallas County in 1947 were

[3]Brief For The State of Texas, pp. 35-39.

Negroes. Petitioner contends that Respondent is in error, saying that the figure as to the total Negro male poll tax payers should be doubled. When this is done the number of eligible male Negroes becomes 13.14 per cent. Negroes constitute 15.5 per cent of the total population of Dallas County according to the 1940 Census.[4] Thus, although women constitute 52 per cent of this total, only 2.86 per cent of the total Negro poll tax payers could be women. This is obviously not the case and Negro men must be a lesser number of the Negro poll tax payers than 5,500.

Again, the census and the *Akins* case show that the proportion of Negroes in Dallas County was 15.5 per cent. That is all the Negroes: men, women, and children. Assuming half of the 15.5 per cent were men and all were eligible to serve, they would still have a percentage of eligibility of only 7.75 per cent (half of 15.5 per cent). But of course all of the Negro men were not eligible. The percentage of Negroes who actually served (6.57) is not very far from the absolute maximum which might serve (7.75) assuming all Negro males were eligible for grand jury service.

To show further that the witness intended his statement that 5,500 was the total number of Negro poll tax payers rather than the male poll tax payers, the 1940 census shows in Dallas County 19,133 male Negroes twenty-one years old or more.[5] By com-

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[4]Brief For The State of Texas, p. 36.

[5]Sixteenth Census of the United States: 1940, Population, Vol. II, Characteristics of The Population, Part 6; Pennsylvania-Texas (U.S. Department of Commerce), p. 818.

paring the total population of Dallas County to the total poll taxes paid, those paying are 20.9 per cent of the population. On this basis a total of not more than 3,998 Negro men would have paid their poll taxes in 1947. Again, in the light of this, the witness could not have meant that 5,500 was total males, but must have meant this, as he said later, as the total of both male and female.

These mathematical calculations are set out to show that Petitioner's view of the testimony of the Secretary of the Progressive Voters' League is mathematically improbable. This conclusion may be reached from a reading of the entire testimony of the witness without resort to the calculations. He testified that "I have never counted that list; I have approximated the names on that list." (R. 12.) The witness also testified that "the vote figure that I have is not broken down between men and women." (R. 13.)

Regarding this testimony, the Texas Court of Criminal Appeals stated:

> "The record before us reflects that there were 5,500 Negroes in Dallas County qualified to vote. But the qualification to vote is but one of the qualifications for grand jurors. Art. 339, C.C.P. It could hardly be said, then, that this record reflects there were 5,500 Negroes in Dallas County qualified for grand jury service." (216 S. W. 2d 813, 819.) (R. 32-33.)

The conclusion of the Court then, is the same as that of the Respondent.

Respectfully submitted,

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Dated November 18, 1948.

Copies hereof have been mailed to opposing counsel.